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What's in a name?

Insurance agent or insurance broker: A distinction with a difference

Disputes often arise over whether a particular seller of insurance is an "agent" or a "broker." The genesis of these disputes typically is found in an insurer's denial of coverage for some claim made by the purchaser of the policy. If the insurer's denial of coverage is determined to be correct, the inquiry inevitably turns to who can be held responsible and why for the uninsured loss? Attendant to these questions is what may become the bigger issue – can the insurer be held liable for an agent's or broker's negligence?

The terms "agent" and "broker" are more descriptive of the conclusion one reaches about the status of the insurance seller after an examination of that person's relationship with the insurer and the insured as well as the specifics of the insurance sale at issue. Some helpful guideposts are discussed below.

Agent or broker?

An "insurance agent" means "a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life, disability, or health insurance, on behalf of an admitted insurance company." (Ins. Code, § 31.) An "insurance broker" means "a person who, for compensation and on behalf of another person, transacts insurance other than life, disability, or health with, but not on behalf of, an insurer. (Ins. Code, § 33.) The primary difference between the two is that an agent has the authority to bind an insurer to coverage because he

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typically acts on behalf of an insurer; a broker has no such authority, as he typically acts on behalf of the insured. (*Marsh McLennan of Calif., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117-18.)

An agent has the authority to do any act that the insurer might do. (*Preis v. American Indem. Co.* (1990) 220 Cal.App.3d 752, 761.) Unless the insured is provided notice (actual or constructive) of any limits on authority, an agent may bind the insurer by any actions, representations, or promises that fall within the scope of the employment even if they violate any restrictions on the agent's authority. (*Troost v. Estate of DeBoer* (1984) 155 Cal.App.3d 289, 298.) Thus, for example, an agent may bind the insurer to his interpretation of ambiguous policy terms (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 874) or to misrepresentations expanding coverage (*Hartford Fire Ins. Co.* (1987) 196 Cal.App.3d 1320, 1325).

A broker's primary obligation is to represent insureds during the application process and negotiate with insurance companies about the terms of coverage, including premiums. (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 929.) Because insurers are not liable for a broker's misconduct, brokers must post and maintain a $10,000 bond, which will be used to resolve any disputes with insureds. (Ins. Code, §§ 1662, 1665.) A presumption of a seller as a broker is automatically rebutted upon a showing that there is a notice of appointment on file by an insurer and the individual has written authority to bind the insurer on the risk without prior approval. (Ins. Code, § 1623(c).) Even without a notice of appointment or written authority, a broker may be considered an agent based on the "totality of the circumstances." (*Id.* at § 1623(d), (e).)

While agents and brokers are legally distinct, in practice, these roles tend to merge to create a "dual" agency, where the seller represents *both* the insurer and the insured during the application process. In fact, for certain lines of insurance, such as automobile and homeowner's insurance, the license issued by the Commissioner of Insurance reference the licensee as a "broker-agent." (Ins. Code, §§ 1625 [referencing property and casualty broker-agent licenses]; 1625.5 [referencing personal lines broker-agent].)

A dual agency may arise where, for example, an agent appointed with numerous insurers chooses a particular insurer but in doing so also represents the insured's interests. (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 865.) An appointed agent may also be a dual agent where he holds himself out to the insured as an expert in the area of insurance for which a policy is sought. By touting his expertise, the agent assumes a special duty to the insured. (*Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1257.)

Often, both brokers and agents will present themselves as an "independent insurance agent." Do not let the reference to "agent" fool you – you must look behind the label and determine whether, based on the individual's statements and conduct, he was acting as an agent, a broker, or both. (*Loehr v. Great Republic* (1990) 226 Cal.App.3d 727, 734.)

Standard for agent liability

Even though, under general agency principles, an agent owes the insured a general duty to use reasonable care, diligence, and judgment in procuring the coverage requested, an agent's violation of this duty does not give rise to personal liability. As a general rule, where an agent acts within the scope of his employment and discloses the agency relationship, he cannot be held personally liable for failing to obtain the requested coverage because such liability ultimately attaches to the insurer as the principal. (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382 [granting summary judgment for agents as insured knew of agency relationship]; see Lab. Code, § 2802.)

Nor can an agent be held personally liable for failing to spontaneously recommend additional coverage, obtain additional, unrequested coverage, or advise that such additional coverage is available. For example, in *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927-928, even though the insureds had worked with the State Farm agent for 20 years, they could not hold the agent personally liable for failing to recommend a "personal umbrella" policy that would cover damages above the uninsured motorist limits of their automobile insurance policy.

The limitations on an agent's duty, however, do not apply in three circumstances that give rise to a special duty. The first is where the agent affirmatively misrepresents the nature, extent, or scope of coverage, or fails to disclose a material fact regarding coverage. The second occurs when the insured requests a specific type or extent of (not just "adequate") coverage. And the third circumstance arises when the agent either expressly agrees to assume additional duties or holds himself out as an expert in the particular area of insurance in which coverage is sought. (*Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1095-1098.)

To illustrate, in *Paper Savers*, the insured purchased a "replacement cost coverage" endorsement based on the agent's representations that, in the event of a total loss, the additional coverage would replace all the business equipment. After the business was completely destroyed by a fire and the benefits the insurer paid on the claim did not cover the cost of replacement, the insured sued the agent, claiming that he assumed a special duty based on misrepresentations and could be held personally liable. The court agreed and reversed the grant of summary judgment for the agent. (*Id.* at 1101; see also, *Westrick v. State Farm Ins.* (1982) 137 Cal.App.3d 685, 691-692 [reversing directed verdict for agent because his failure to disclose that auto policy did not cover six-wheel truck constituted a misrepresentation for which he could be held tortiously liable].)

The same result obtained in *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, where the agent both failed to obtain the personal injury coverage the insured had specifically requested and misrepresented that such coverage existed. After judgment was entered against the insured in a malicious

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prosecution case (which Truck Insurance had refused to defend), the insured sued the agent and Truck Insurance for indemnity. The court upheld the denial of the agent's summary judgment motion because there were triable issues of fact as to whether the agent assumed a special duty and could be held personally liable. (*Id.* at 1462-1465.)

Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Calif. (2009) 177 Cal.App.4th 624 provides a good example of liability befalling an agent who claims specific expertise. There, the owners of Rhino Linings of Santa Fe Springs obtained a CGL policy from an agent who had touted her familiarity with the Rhino Linings dealerships and her expertise in obtaining coverage that met the business's needs. After an employee got severely injured on the job, the insurer denied the insureds' claim, advising that their CGL policy did not include workers' compensation coverage. The Court of Appeal affirmed the trial court's conclusion that the evidence showed the agent had assumed (and breached) a special duty by touting her expertise. (*Id.* at 637.)

A common argument the insurers made in *Paper Savers*, *Butcher*, and *Williams* is the general rule set forth in *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 157 – that an insured has a duty to read the policy and is bound by its clear and conspicuous terms. In each case, the court rejected this contention, finding that where an agent affirmatively misleads the insured as a result of his negligence, the *Hadland* rule does not apply. (*Paper Savers*, *supra*, 51 Cal.App.4th at 1101-1102; *Butcher*, *supra*, 77 Cal.App.4th at 1463; *Williams*, *supra*, 177 Cal.App.4th at 637-639.) Indeed, as the court in *Paper Savers* noted, the *Hadland* rule's applicability appears limited to the interpretation-of-policy-terms context where the insured sues the *insurer* for coverage. (*Id.*, 51 Cal.App.4th at 1102.)

Standard for broker liability

If the "independent insurance agent" turns out to be a broker and the presumption of broker status is not rebutted, the broker may be held personally liable for an uninsured loss resulting from a breach of a duty owed to the insured. Liability cannot be imputed to the insurer. (Ins. Code, § 33.)

But since many brokers have agency agreements with various insurers, more often than not, a broker will be a dual agent where liability may attach to the insurer. (See, *e.g., Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803 [brokerage firm had agency agreements with numerous insurers and was thus a dual agent]; *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249 [insured sued both broker and insurer for uninsured loss].)

While a broker represents the insured's interests, the duties owed to the insured are not boundless. For instance, like an agent, a broker has no duty to spontaneously recommend adequate coverage or advise the insured about specific insurance matters. (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954 ["The general duty of reasonable care which an insurance [broker] owes his client does not include the obligation to procure a policy affording the client complete liability protection, as appellants seek to impose here."]; *Wallman v. Suddock* (2011) 200 Cal.App.4th 1288, 1313-1315 [finding that broker had no duty to advise insureds to obtain excess coverage over existing and past primary policies that covered liability as insureds never disclosed need for such coverage].)

And because a broker's duties to an insured are limited to the procurement of the policy, brokers have no duty to notify insureds of an insurer's insolvency (or change in financial condition) or that the policy has been cancelled. (*Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278, 1283 [no duty to notify of insurer's insolvency]; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123 [no duty to notify of policy cancellation].)

There are three circumstances in which a broker breaches the duties owed to an insured: (1) the broker misrepresents the nature, scope, or extent of coverage; (2) the insured requests a particular type or extent of coverage; and (3) where the broker either expressly agrees to assume additional duties or holds himself out as an expert. (*Pacific Rim Mechanical Contractors, Inc.*, *supra*, 203 Cal.App.4th at p.1283.) In ascertaining whether a broker has breached a duty, courts consider additional factors such as the length of the relationship and whether the broker knew of the risks involved in the insured's business.

Thus, in *Greenfield v. Insurance, Inc.* (1971) 19 Cal.App.3d 803, 809-810, the court upheld the judgment against the broker because the record showed that the insured had relied on the broker for over a decade for his business insurance needs; the broker knew of the risks involved in the insured's business if there were gaps in coverage; the insured had specifically requested that the policy cover the costs of any mechanical breakdown of the business's equipment; and the broker had represented to the insured that such coverage was provided under the policy it had procured.

Third Eye Blind, Inc. v. Near North Entertainment Ins. Servs. (2005) 127 Cal.App.4th 1311 presented the circumstance of a broker who was found liable for touting its expertise. There, the band, Third Eye Blind, obtained a CGL policy from the broker and was thereafter sued by a former band member for trademark infringement. After the insurer denied the claim, citing the trademark infringement exclusion, the band sued both the broker and the insurer.

The insurer ultimately settled with the band and covered the loss. The broker argued that, in light of the settlement, its liability for the loss was therefore precluded and the case should be dismissed. The court disagreed, finding that because the broker, which had touted its expertise, failed to "secure more direct, and certain, coverage," it could be held liable for the attorneys' fees the band had incurred in bringing the coverage action. (*Id.* at 1323, 1324.)

Of note, there is no indication that the holding in *Third Eye Blind* is limited to brokers. If an agent, therefore, assumes a special duty to an insured or is a dual agent and the insurer ultimately covers the loss, the insured should try

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to recover from the agent all damages stemming from his negligence.

Like agents, brokers also tend to raise the duty-to-read argument to avoid liability. This is no defense. "Absent some notice or warning, an insured should be able to rely on a [broker's] representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45.)

Insurer's liability for agent's misconduct

Under respondeat superior, an insurer may be held vicariously liable for an agent's misconduct committed during the course and scope of employment. (*Desai v. Farmers Ins. Exch.* (1996) 47 Cal.App.4th 1110, 1118.) Even if the insurer did not specifically authorize the agent's acts, it may still be held liable if it ratifies those acts (e.g., by retaining the premiums). (*R&B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 344.)

In *Desai*, the insured specifically requested that any earthquake, fire, and hazard policy provide 100 percent replacement cost coverage. The policy the agent obtained, however, contained no such coverage. The court held the insurer could be held liable under the theory of ratification (as well as ostensible authority) for the agent's negligence in failing to provide the specifically requested coverage. (*Desai*, *supra*, 47 Cal.App.4th at 1119-1121.)

An insurer can, likewise, be held liable for its agent's misrepresentations regarding coverage. In *R&B Auto Center*, the agents represented to the insured, a used car dealership, that the policy provided lemon-law coverage for used cars when, in reality, coverage only extended to new cars. After the insurer refused to defend the insured in a lawsuit brought by a customer, the insured sued the insurer and the agents for fraud, among other things. The Court of Appeal concluded that the insurer could be held vicariously liable for the agents' misrepresentations. (*Id.* at 345-346.)

Particularly interesting was the court's statement that, upon remand, the insureds could assert a claim for reformation of the policy so that it provided lemon-law coverage for used cars. The insurer could then be held liable for breaching the contract *as reformed*. (*Id.* at 349, fn. 11.)

Like agents and brokers, insurers commonly raise the insured's duty to read as a defense. While several courts have held that a duty to read is no defense to an agent or broker's misrepresentations (e.g., *Paper Savers*, *supra*; *Westrick*, *supra*), some courts have held the opposite. In *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1589, for instance, the court found the insured had unjustifiably relied on the agent's representations because the policy's clear and unambiguous terms contradicted the representations. But if the policy terms are neither clear nor unambiguous, the *Hadland* rule has no application.

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